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## **'The exercise of governance authority by international organisations: The role of due diligence obligations after conflict'**

### **Abstract**

*International legal scholarship largely ignores due diligence, yet its obligations do subsist. The Alabama Arbitration, the evolution of international economic, human rights and humanitarian law are all concerned with due diligence. During post-conflict transitions when international organisations hold governance roles normally associated with states the necessity of understanding the institution's due diligence obligations becomes more apparent. In examining due diligence this article shines a light on an important aspect of the operational role of law in regulating international organisations during transition when the duality of governance can cause legal obligations to become indistinct.*

**Key words:** due diligence, IGOs, omissions, positive obligations post-conflict

International legal scholarship largely ignores due diligence, nonetheless it continues to create obligations.<sup>1</sup> The *Alabama Arbitration*, the evolution of economic law, the development of international human rights law and aspects of international humanitarian law all concern standards of due diligence.<sup>2</sup> Critically, during times of transition, when international organisations (IGO) adopt roles normally associated with state authority, the necessity of understanding an institution's due diligence obligations becomes ever more vital. During post-conflict periods IGOs must be both proactive and reactive, taking upon themselves international human rights, humanitarian, economic law obligations. This chapter questions the utility of due diligence in post-conflict periods and considers IGOs commitment to its inculcation into their activities.

While a settled definition remains absent due diligence becomes operative upon the assumption of effective control over territory or populations coupled with the degree of predictability of harm alongside the importance of the interest to be protected.<sup>3</sup> It includes the imperative to assess harm and risk, obligations to notify and consult, prevention and protection, a duty to investigate as well as reparations or restitution when harm occurs.<sup>4</sup> Particularly with regard to IGOs but also due to inadequacies within substantive due diligence, ambiguity as to its content and practice emerged that lead to failures in carrying out aspects of its obligations. As this article discusses, this failure is particularly problematic post-conflict regarding to IGOs. Even so, these gaps also demonstrate where

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<sup>1</sup> For an early outline see Amos S. Hershey, *The Essentials of International Public Law and Organization* (MacMillan, 1927) 254

<sup>2</sup> *Corfu Channel Case (UK v Albania) (Merits)* [1949] ICJ Rep 4, *Alabama Claims Arbitration (United States/Great Britain)* (1872) 29 RIAA 125, some admirable exceptions of course exist and largely fall into the categories of environmental law, state responsibility and gender, Carin Benninger-Budel (ed) *Due Diligence and its Application to Prevent Violence Against Women* (Martinus Nijhoff 2008), Jan Arno Hessbruegge 'The Historical Development of the Doctrines of Attribution and Due Diligence in International Law' (2003-2004) 36 *New York University Journal of International Law and Politics* 265, Nigel D. White, 'Due Diligence Obligations of Conduct: Developing a Responsibility Regime for PMSCs' (2012) 31 *Criminal Justice Ethics* 233, Robert P. Barnidge Jr, 'The Due Diligence Principle under International Law' (2006) 81 *ICLR* 8, Carsten Corino, 'Environmental Due Diligence' (2000) 9 *European Energy and Environmental Law Review* 120, Daria Davitti, 'On the meanings of international investment law and international human rights law: the alternative narrative of due diligence' (2012) 12 *HRLR* 421

<sup>3</sup> ILA Study Group on Due Diligence in International Law, available at [http://www.ila-hq.org/en/committees/study\\_groups.cfm/cid/1045](http://www.ila-hq.org/en/committees/study_groups.cfm/cid/1045)

<sup>4</sup> Ibid.

due diligence, without the creation or re-naming of entirely new bodies of law, could be put to good use in situations where the legitimacy of constituted power is contested.

Extensive governance roles for IGOs occur where peacekeeping is matched with broader constituted authority or what is termed as territorial administration. Albeit, the blurred character of governance in such circumstances makes clear categorisations difficult.<sup>5</sup> Ratner argues given the large military presences involved in IGO governance 'the cognitive dissonance' between occupation and administration becomes unclear.<sup>6</sup> Such dissonance opens a gap where due diligence could ensure legal protection continues. Kosovo stands as an obvious example of IGO governmental authority, but, even in circumstances of less apparent control, levels of constituted authority are exercised. Such governance evolved alongside the evolution of multilateralism and its inception is contemporaneous with the creation of the League of Nations. The administration of territory, be it in the inter-war period in Danzig<sup>7</sup> or the Saar Basin,<sup>8</sup> post World War II Berlin or Vienna, or the intended plans for Jerusalem,<sup>9</sup> Trieste between 1947 and 1954<sup>10</sup>, Irian Jaya,<sup>11</sup> or Eritrea, failed to establish single structures. Despite the quite extensive heritage (particularly the number of persons subject to such governance) organisational accountability remains 'lite-touch' and clear due diligence steps narrowly construed.<sup>12</sup>

As states become but one amongst a plethora of global actors engaged in post-conflict administration questions of constituted authority will abound. Broader questions regarding the nature of IGO administration, including its legitimacy, fall into the quagmire of semi-recognised states. Due to their non or partial recognition within international law, such territories participation in the creation of customary international law or within decision-making processes is doubtful, thus they do not partake in the processes of legitimatising actions that create IGO administration. Indeed, the temporal and bordered character of these administration systems create issues for IGO-led governance that some liken to colonialism.<sup>13</sup>

Chesterman asks '[i]s it possible to establish conditions for legitimate and sustainable governance through a period of benevolent foreign autocracy? If it is possible to answer this in the positive the question becomes whether due diligence aids in achieving such legitimacy?'<sup>14</sup> Whilst this article examines the specific role of IGOs post-conflict it recognises a duality where states' governance also subsists. When IGOs insist on international humanitarian, human rights or economic standards

<sup>5</sup> See for example, Simon Chesterman, *You, the People: The United Nations, Transitional Administration, and State-building* (OUP, 2005)

<sup>6</sup> Steven Ratner, *Foreign Occupation and International Territorial Administration: The Challenges of Convergence* (2005) 16 EJIL 695, 695-697, David Scheffer, 'Beyond Occupation Law', (2003) 97 AJIL 842

<sup>7</sup> Treaty of Versailles Articles 100-108 (1919) 13 AJIL Supp. 151, 385

<sup>8</sup> Ibid. 385

<sup>9</sup> UNGA Resolution Adopted on The Report of the Ad Hoc Committee on the Palestinian Question UNGA Res 181 (1947)

<sup>10</sup> Paris Peace Treaty with Italy and Annex (1947) 49 UNTS 747

<sup>11</sup> Agreement between the Republic of Indonesia and the Kingdom of the Netherlands Concerning West New Guinea (1962) UNTS 274

<sup>12</sup> For a discussion of organisational accountability see Carsten Stahn (ed) *The Law and Practice of International Territorial Administration: Versailles to Iraq and Beyond* (CUP, 2008), Ralph Wilde, 'From Danzig to East Timor and Beyond: The Role of International Territorial Administration', (2001) 95 AJIL 583

<sup>13</sup> Eric Hobsbawm, *Nations and nationalism since 1780: Programme, myth, reality* (CUP, 2012), Roland Paris, 'International Peacebuilding and the "Mission Civilisatrice"' (2002) 28 *Rev Int'l Stud* 637

<sup>14</sup> Chesterman (n 5), 1

rested on due diligence be part of the new state order, but without applying the same to their own operation, they create a space where legal obligations can be sidestepped.<sup>15</sup> While some of the difficulty lies in treaties largely creating state obligations the degree to which international humanitarian and human rights law is customary international law requires all public (and some private) actors to comply.<sup>16</sup> This chapter draws attention to a particularly useful way of examining the role of IGOs in situations which continuously cause difficulty for those seeking such organisations to be more reflective and accountable in their exercise of governance authority.

Even as the overarching question of legitimacy remains the most critical this piece asks whether there is a standard by which to adjudge the actions of IGOs and if due diligence establishes a fulcrum around which resources can be allocated, where IGOs are required to plan ahead, to anticipate issues likely to arise in post-conflict situations and out of their intervention as well as reacting when unanticipated problems arise. This chapter asks what positive obligations are due during transition, are these similar or perhaps higher than those obligations during 'peace.' It asks whether the due diligence obligations associated with states regarding international humanitarian law, human rights and economic law transfer to the other actors exercising governance during transition. Further, it questions whether the absence of IGO due diligence forms a basis for states in transition to abandon a paradigm where their obligations outweigh that of other actors. This leads to a critical appraisal of the utility or otherwise of invoking due diligence when understanding governance post-conflict.

### The Character of Due Diligence

Due diligence throws up some of the classic tropes of international law, from Grotius to *Lotus*, from *Alabama Arbitration* to the *Nicaragua Case*. Thus, it remains surprising that it has not met with more concerted analysis.<sup>17</sup> With Grotius making use of the term as a form of accountability in the 17<sup>th</sup> Century, and Vattel following suit, Hessbregge notes that due diligence forms part of the modern tradition of international law.<sup>18</sup> In the era of 'pure inter-state' relations due diligence found its feet in both the *SS Lotus* and the *Alabama Arbitration*.<sup>19</sup> Both cases are critical in developing standards by which states are bound to act with due diligence and establishes how accountability flows from a failure to carry out legal obligations. The significance of *Alabama Arbitration* lies in its interpretation of due diligence to include private acts for which the state ought to exercise control as well as a relatively high proportionality standard of review. The recent ILA First Draft Report on Due Diligence points toward a growing recognition that questions of governance normally reserved for the corporate world, domestic administrative or constitutional considerations are of critically import to international law.<sup>20</sup>

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<sup>15</sup> For a discussion of this issue of accountability see Guglielmo Verdirame *The UN and Human Rights: Who Guards the Guardians?* (CUP, 2011) 320-393

<sup>16</sup> Draft First Report on Due Diligence [http://www.ilahq.org/en/committees/study\\_groups.cfm/cid/1045](http://www.ilahq.org/en/committees/study_groups.cfm/cid/1045) and ILC *Draft Articles on the Responsibility of International Organizations* (n 2)

<sup>17</sup> International Law Association, First Report on Due Diligence and Committee on the Accountability of International Organisations, Final Report (2004), <http://www.ilahq.org/en/committees/index.cfm/cid/9>

<sup>18</sup> Hessbruegge (n 2), 283 Emmerich de Vattel, *The Law of Nations or the Principles of Natural Law* (1758)

<sup>19</sup> *SS Lotus (France v Turkey)* 1927 PCIJ (Ser. A) No 10, *Alabama Claims Arbitration (United States/Great Britain)* (1872) 29 RIAA 125, 129.

<sup>20</sup> (n 16)

Beside its academic marginality, due diligence's lack of attention stems from states' reluctance, that extends to IGOs, to acknowledge the full extent of positive obligations. Positive obligations require actors to take active steps to ensure effective fulfilment of obligations. These positive obligations can incur not only financial costs but also require increased oversight to ensure that obligations are fully adhered to and employed. The very nature of due diligence; the assessment of harm and risk, requirements to notify and consult, prevention and protection, duty to investigate and reparations or restitution when harm has occurred, all require active steps to be taken to ensure obligations are fulfilled. The actual terms of due diligence remain narrow and, in many ways, ill-defined. While there are several quasi-judicial arbitral decisions referring to due diligence there is little elucidation on its actual content.<sup>21</sup> Nonetheless, the effectiveness of state control, the concern to be protected, the predictability of potential harm and the possibility of justice highlight how due diligence ought to be exercised.<sup>22</sup> As the ILA First Draft Report recognises there is acceptance that due diligence will be examined on an international rather than a domestic standard but also that the degree to which there is a common standard of due diligence across all areas remains open to debate.<sup>23</sup>

Due diligence is both a positive obligation and an accountability mechanism, its utility in post-conflict conditions may be to decipher who is in control in a given situation thus determining who ought to exercise governance and whether the necessary steps to carry out such governance has been legitimately achieved. Indeed, given that these questions can be the main sticking point in periods of transition, identifying who possesses the positive obligations associated with due diligence, even if such obligations are limited, is crucial. As demonstrated elsewhere positive obligations are notoriously difficult to invoke by those seeking protection and freedom from governance orders.<sup>24</sup> Indeed, numerous economic rights debates have been caught in the quagmire of positive obligations whilst the language of responsibility to protect takes state's obligations to their own citizens as their starting point, but beyond this there has been a failure to turn this responsibility into an obligation to intervene.<sup>25</sup>

Responsibility and due diligence are closely associated but critically, remain separate charges.<sup>26</sup> Concentration on responsibility, particularly state responsibility, at times, masks the continual and evolving character of obligations attached to due diligence. Whilst often with regard to responsibility (whether state, IGO or individual) failures to exercise due diligence are the most apparent, positive duties ought to form part of planning, carrying out, enforcing and reviewing of governance activities. Thus, due diligence ought to be considered both before and during legal development, implementation, enforcement and in any proposed reform.

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<sup>21</sup> *Boyd v. United States* 1886 (UNRIAA IV, 380), Wipperman Case in John Bassett Moore, *History and Digest of the International Arbitrations to which the United States has been a Party*, Washington 1898-1906) 3041.

<sup>22</sup> See *Chapman Claim* (UNRIAA IV, 632), *Neer Case* UNRIAA IV, 60, *Venable Case* (UNRIAA IV, 219

<sup>23</sup> ILA Report (n20)

<sup>24</sup> Margot E Salomon, *Global responsibility for Human Rights* (OUP, 2007) Chap 4

<sup>25</sup> Anne Orford, *International Authority and the Responsibility to Protect* (CUP, 2011) Carsten Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm' (2007) 191 *AJIL* 99. See for example, *Osman v UK*, ECtHR App no 87/1997/871/1083, judgment of 28 October 1998, para 116

<sup>26</sup> Ricardo Pisillo-Mazzeschi, 'The Due Diligence Rule and the Nature of the International Responsibility of States' (1992) 35 *German Yearbook of International Law* 9, Ricardo Pisillo-Mazzeschi, 'The Due Diligence Rule and the Nature of the International Responsibility of States' in Rene Provost (ed) *State Responsibility in International Law* (CUP, 2002)

Before embarking on an examination of due diligence in post-conflict, based within the normative law out of which its duties and obligations emerge, it is important to tackle the values behind the concept. First, and probably most importantly, due diligence is divided between its public and private spheres. But, as with all public/private divides this serves the neat criteria of traditional analysis and as with all such partitions is entirely false.<sup>27</sup> Public/private due diligence certainly impacts upon international law and is central to how responsibility is circumnavigated where private bodies perform state activities in post-conflict state-building, the role of private military contractors, as discussed by Sorchá McLeod in this volume, attests to this complication. Further, the public/private divide results in well-established negative consequences for women within a society masked by such partitions. Although, recently within the UN it is often with regard to women that due diligence is most often discussed as echoed by Aisling Swaine in her chapter.<sup>28</sup>

Second, due diligence requires resource and capacity by whoever is exercising governance and, thus far, it has been interpreted along the Global North's economic preconceptions. At times, due diligence provides some scope for differential treatment during conflict, but this has not been extended to circumstances of economic or other capacity deficiencies that result in a failure to fully engage with the form of resource allocation mandated. While this chapter focuses on IGOs the requirements due diligence sets and the implications thereof ought not be underestimated. Thus, we need to ensure that in extending the use of due diligence, we are not simply broadening the Global North's control of the governance debate to find the Global South "wanting". Such difficulties already play out in organisations such as the WTO where questions as to the parity of capacity to benefit from the institution's structures and processes are recognised.<sup>29</sup> The implications of undertaking due diligence ought not to find the global legal regime focusing on, for example, African states, but rather recognising that the form in which due diligence has thus far been pursued is not without alternatives.

Third, due diligence can be reduced to a tick-boxing exercise where procedural steps, mask underlying obduracy, wrongful action or assistance, wilful omission or action in the knowledge that it will have little positive impact or perhaps the very opposite effect of what is intended. The meaningfulness of a due diligence process requires a substantive system of review be maintained. International law is notoriously bad at carrying out review processes or even possessing bodies that are capable of examining the activities of other bodies. Of late, this has garnered some attention and small steps towards achieving some form of assurance are muted, but due diligence requires more than the occasional cases to ensure it is more than a tick-boxing exercise.<sup>30</sup>

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<sup>27</sup> Duncan. Kennedy, 'Stages of the Decline of the Public/Private Distinction' (1981) 130 *U. Pa. L. Rev.* 1349, Susan B Boyd (ed) *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (University of Toronto Press, 1997) William Lucy, 'What's Private about Private Law?' in Andrew Robertson & Hang Wu Tang *Goals of Private Law* (Hart 2009) 47-75

<sup>28</sup> Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo UN Doc A/HRC/23/49 2013

<sup>29</sup> For details on the WTO's assistance in capacity building see Trade-Related Technical Assistance, Doha WTO Ministerial 2001, Ministerial Declaration WT/MIN(01)/DEC/1, 20 November 2001 para. 38-41 or Special and Differential Treatment, on Special and Differential Treatment, General Agreement on Tariffs and Trade Article XVIII

<sup>30</sup> See, Thomas M. Franck, 'The "Powers of Appreciation": Who Is the Ultimate Guardian of UN Legality?' (1992) 86 *AJIL* 519, Ruth W. Grant and Robert O. Keohane, 'Accountability and abuses of power in world politics'

Fourth, due diligence has its most obvious iterations in the economic context and, as such, caution needs to be exercised in drawing analogies. The roles of bodies such as the World Bank Group, but probably with more infamy, the IMF in imposing conditionality which forces post-conflict (and, at times, pre-conflict) states to adopt liberal economic policies such as; privatisation, the introduction of policies which ensure foreign investment especially in the provision of state services, the tendering of natural resource exploitation that inevitably end up with foreign firms with 'capacity', has often precipitated more conflict and remains deeply problematic.<sup>31</sup> The use of private law conceptions of due diligence by these economic organisations continues this trend. Thus, any furtherance of the use of due diligence ought to take the public law conception of its operation rather than differentiating between its public and private use. This is of particular importance as international economic law is one area in which significant due diligence practice has emerged.<sup>32</sup>

A final introductory question is what ought due diligence aim to achieve? First, it ought to be a method of self-regulation where IGOs and states reflect on proposed actions in post-conflict planning to ensure that in each area (international humanitarian, human rights and economic law) that they are compliant while ensuring the process is documented. Second, during the period of transition, however long it takes to actually achieve a form of sustainable peace, it ought to be used as a method of continual assessment to ensure continued compliance with obligations. Third, and finally, throughout the process and into the post-conflict state-building scenario, due diligence ought to operate as a method of holding IGOs (and states) to account for their actions at the domestic, regional and global levels. Due diligence threads together a variety of legal strands and ought to act to ensure obligations are upheld by all actors. In scenarios where IGOs fail in their due diligence obligations a space opens for populations under administration to question IGO legitimacy and in certain scenarios, reject IGO governance.

### *Governance post-conflict*

The underlying legal basis of international territorial administration often emerges from the Security Council but can also derive from peace agreements amongst interested parties.<sup>33</sup> These peace agreements, while slightly more detailed than resolutions, remain vague as to the obligations they impose on global actors engaged in transition. These resolutions rarely mention standards or positive legal obligations on which to adjudge whether IGOs act or fail to act on the basis of due diligence or even if this is intended by the Security Council or, if, rather it is relying on a general standard within international law. As the Constitutional Court of Bosnia Herzegovina stated in 2000;

Acts by... international authorities were often passed in the name of the mandates under the regime of the League Nations and, in some respect, Germany and Austria after the Second World War. Though recognized as sovereign, the States concerned were placed

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(2005) 99 *American Political Science Review* 29, Vivien Collingwood, 'Non-Governmental Organisations, Power and Legitimacy in International Society' (2006) 32 *Rev Int'l S* 439

<sup>31</sup> Michael Newman, *Humanitarian Intervention, Confronting the Contradictions* (Hurst, 2009) 111-137

<sup>32</sup> United Nations Convention against Corruption (UNCAC), 2000 UN Convention against Transnational Organized Crime 1999, International Convention for the Suppression of the Financing of Terrorism, 2005 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism 2005

<sup>33</sup> For example, General Framework Agreement for Peace in Bosnia and Herzegovina November 21, 1995 UN Doc A/50/79C

under international supervision, and foreign authorities acted in these States, on behalf of the international community, substituting themselves for the domestic authorities. Acts by such international authorities were often passed in the name of the States under the supervision... Such situation amounts to a sort of functional duality: an authority of one legal system intervenes in another legal system, thus making its functions dual. The same holds true for the High Representative: he has been vested with special powers by the international community and his mandate is of an international character.<sup>34</sup>

This duality is perhaps the core difficulty in undertaking due diligence analysis in post-conflict situations. Where and when the duties of states and IGOs may be different or identical and, thus, overlap, can be entirely unclear. Nonetheless, in making such an analysis and finding parties wanting, a more concerted claim to reform must be proposed.<sup>35</sup> While the idea that an IGO's ought to incorporate human rights obligations into their operational guidelines, policies and procedures, particularly when exercising governmental authority in the conduct of temporary administration ought to be widely accepted, utilising a due diligence methodology to achieve this has yet to be embedded in IGO practice.

Ratner suggests that traditional occupations have been seen by states in terms of international humanitarian law, whereas IGOs favour a human rights paradigm.<sup>36</sup> He argues that this stems from their different bureaucratic form (one militarised with civilian support the other civilian with military support) rather than a substantive legal difference. Nonetheless, as Ratner argues both are relevant no matter the governance form taken. Following the *Nuclear Weapons Case* it is clear that both international human rights and humanitarian law can be mutually applicable and whilst it may be argued that the territorial administration suggests the conflict is over and thus international humanitarian law (IHL) no longer applies the requirement of (foreign) military forces suggests otherwise.<sup>37</sup> Further, the UN accepts the necessity of peacekeepers following IHL.<sup>38</sup> Thus, the requirements of due diligence under both international humanitarian and human rights law makes it of wider import for those exercising governance than merely the military actors. The UN, alongside the World Bank Group and the IMF are also deeply engaged in economic re/construction. The following sections discuss the due diligence requirements in international institutional, humanitarian, human rights and economic law questioning whether they provide any basis for understanding due diligence in post conflict.

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<sup>34</sup> Constitutional Court of Bosnia and Herzegovina *Eleven members of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina* U-9/00 (2000)

<sup>35</sup> See Kosovo, Security Council Resolution 1244 (1999) 'Requests the Secretary-General to appoint, in consultation with the Security Council, a Special Representative to control the implementation of the international civil presence, and further requests the Secretary-General to instruct his Special Representative to coordinate closely with the international security presence to ensure that both presences operate'

<sup>36</sup> Ratner (n. 6), 702, see also ICRC Report on Contemporary Challenges to International Humanitarian Law, 31IC/11/15.1.2 available at <http://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf>

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<sup>37</sup> *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Reports 226, Ratner (n.7), 695-697

<sup>38</sup> Observance by United Nations forces of international humanitarian law. 6 Aug. 1999, UN Doc. ST/SGB/1999/13. The Brahimi Report and the Future of UN Peace Operations makes no mention of due diligence <http://www.stimson.org/images/uploads/research-pdfs/BR-CompleteVersion-Dec03.pdf>



## Due Diligence within International Institutional Law

The role of IGOs in the administration of territory has been well documented.<sup>39</sup> Questioning the roles IGOs take in the practice of due diligence particularly where these may differ from the position of states and thus establish new practice is significant. The ICJ affirmed in both the *Reparations* and *Certain Expenses* advisory opinions that an international organisation, through the attainment of legal personality, has responsibility.<sup>40</sup> Yet, thus far, responsibility remains with domestic institutional obligations. For example, within human rights this tends toward state-based institutions being made available for human rights enforcement, protection and monitoring but, as Wilde argues ought to be viewed as also pertaining to IGOs.<sup>41</sup> '[L]egal responsibility can be incurred if the conduct of an organ was based on an error of judgment which, in analogous circumstances, an administrative or executive authority exercising ordinary care and diligence would not have committed.'<sup>42</sup> In addition, as with states, IGO's due diligence relates to questions of responsibility and implementation. Thus, as with state responsibility, it tends towards the reactive rather than a reflective or positive practice.

The ILA's 2004 Report on Accountability of International Organisations makes clear links to due diligence and utilises both constituent documents and general international law as sources of accountability;

The Committee considers that accountability of IO-s consists of three levels which are interrelated and mutually supportive

-... in the fulfilment of their functions as established in their constituent instruments, are and should be subject to, or should exercise, forms of internal and external scrutiny and monitoring, irrespective of potential and subsequent liability and/or responsibility;

-... liability for injurious consequences arising out of acts or omissions not involving a breach of any rule of international and/or institutional law ...

- responsibility arising out of acts or omissions which do constitute a breach of a rule of international and/or institutional law (e.g. violations of human rights or humanitarian law, breach of contract, gross negligence, or as far as institutional law is concerned acts of organs which are ultra vires...)<sup>43</sup>

While due diligence and accountability are far from synonymous both are intertwined in governance. The steps required for accountability include both positive and negative obligations, the scrutiny and monitoring of acts and omissions extends to liability at both a civil (breach, negligence, ultra vires)

<sup>39</sup> Ralph Wilde *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away* (OUP, 2010)

<sup>40</sup> *Reparations Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Reports 174, *Certain Expenses of the United Nations* (Advisory Opinion) [1962] ICJ Reports 151, 167-68

<sup>41</sup> Ralph Wilde, 'International Territorial Administration' in Nigel White and Dirk Klaasen (eds.), *The UN, Human Rights and Post Conflict Situations* (Manchester University Press, 2005) 149

<sup>42</sup> ILA Committee on the Accountability of International Organisations, Final Report (2004) , available at <http://www.ila-hq.org/en/committees/index.cfm/cid/9>, 15, *Fresh Marine Company SA v. Commission of the European Communities, Judgment of the Court of First Instance, 24 October 2000, Case T-178/98, paras. 61 and 82*

<sup>43</sup> Ibid. 2

and criminal (human rights and humanitarian law) level. The ILA Report makes a specific link between accountability and power, but also procedural regularity. In the process of state-building, where IGOs exercise extensive governance powers, such accountability is at its utmost import and due diligence is a key element in scrutinising and recording decision-making processes.<sup>44</sup>

The ILA Report on Accountability sets out a number of principles which forge links between states and IGOs. By placing responsibility with both this Report echoes the views of the Constitutional Court of Bosnia Herzegovina in 2000.

1. Member States as members of an organ of an IO, and organs and agents of an IO have a fundamental obligation to ensure the lawfulness of actions and decisions.
2. All organs and agents of an IO, in whatever official capacity they act, must comport themselves so as to avoid claims against the IO.
3. Members of an IO have a duty to exercise adequate supervision of the IO, i.e. to ensure that it is operating in a responsible manner so as to protect not only their own interests but also that of third parties.<sup>45</sup>

Yet, merely focusing on the avoidance of claims against the IGO is too narrow for due diligence requirements which necessitates positive steps to be undertaken. But the recognition of the duality of both the international organisation and the state governance is critical.

Neither the Draft Articles on State Responsibility nor the Responsibility of International Organisations contain any direct references to due diligence but nonetheless remain relevant.<sup>46</sup> Significantly, both state and IGOS take responsibility as a reactionary form. Albeit, under article 2 of the Draft Articles, IGOs can have responsibility for both acts and omissions.<sup>47</sup> Both sets of articles also focus on accountability as legal responsibility in a narrower sense than the ILA Report. But as with accountability, the relationship between the state and the IGOs in the forms of responsibility is relevant. Boon, echoing the claims to duality, argues that IGOs often rely on states to fulfil the requirements, but due diligence falls on both and does not act as a shield for either.<sup>48</sup> Boon argues that the Draft Articles have several consequences for IGOs, two of which are relevant here. First, IGOs may reconsider how they define agents and their contracts and second, it 'may lead IOs not to act when they lack a proper mandate or funding. Especially in light of their potential legal exposure for omissions, IOs may avoid engaging when they cannot meet a certain standard of care or level of

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<sup>44</sup> See Joene Cerone 'Reasonable Measures in Unreasonable circumstances: a legal responsibility framework for human rights violations in post-conflict territories under UN Administration' in White and Klaasen (n 42) 77- 79

<sup>45</sup> Ibid, 15

<sup>46</sup> *Articles on the Responsibility of International Organizations* (n 2), *Articles on Responsibility of States* (n 2), though they are referenced elsewhere with regard to states such as Report of the International Law, *ILC Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities Commission*, (2001) UN Doc. A/56/10

<sup>47</sup> *Articles on the Responsibility of International Organizations* (n 2)

<sup>48</sup> Kristen E. Boon, 'New Directions in Responsibility: Assessing the International Law Commission's Draft Articles on the Responsibility of International Organizations' (2011) 37 *Yale J Int'l L Online* 1, 4

due diligence.<sup>49</sup> This may be particularly important to IGOs should they embrace the state-led usage of private military companies as discussed in Sorch MacLeod's contribution.<sup>50</sup>

The ILA Report on the Accountability of International Organisations makes specific reference to decisions regarding the use of force, peacekeeping or enforcement operations, the imposition of coercive measures, structural adjustment programmes and development projects during the temporary administration of territory in the context of international human rights and humanitarian law obligations.<sup>51</sup> Interestingly, while the ILA Report does not utilise due diligence in all situations of accountability it does state that where there is a lack of standing mechanisms for private claimants against IGO's it leaves the sole route state jurisdiction, meaning accountability is lacking. Further, the internal local claims review boards established during peacekeeping operations are inadequate due to their lack of public rulings and potential for lack of independence or objectivity.<sup>52</sup> These point to the difficulties which abound when points of governance remains opaque and duality continues.

The UN has made specific due diligence recommendations regarding its own actions during post conflict periods. The 2013 *UN Human Rights Policy on Due Diligence* includes specific steps to be taken before providing support to non-UN forces.<sup>53</sup> This policy follows a similar pattern to others issued by IGOs by focusing on the outward facing attributes of the UN's interaction with non-UN forces, albeit it requires the UN to act with due diligence and incorporates international human rights and humanitarian law into its obligations as well as an implementation policy. It provides that support be 'consistent with the purposes and principles as set out in the Charter of the United Nations and with its responsibility to respect, promote and encourage respect for international humanitarian, human rights and refugee law' while also asking that both the Security Council and General Assembly utilise the guidelines when either mandate action.<sup>54</sup> The policy regards due diligence as risk assessment, transparency and effective implementation with more detailed requirements under each category.<sup>55</sup> This policy follows the *Due diligence Guidelines for the Responsible Supply Chain of Minerals from Red Flag Locations...Democratic Republic of the Congo* includes a Group of Experts on due diligence.<sup>56</sup> Both guidelines ought to be welcomed as a positive step in the UN's response to its positive obligations yet they remain comparatively isolated examples.

In 2006, the Special Rapporteur on Violence Against Women its causes and consequences, openly criticising the reactive approach taken by states, instigated a due diligence approach to ensure

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<sup>49</sup> Ibid, 10

<sup>50</sup> For review of requirements of private companies see Sorch MacLeod 'EU operations and private military contractors: issues of corporate and institutional responsibility' (2008) 19 *EJIL* 965

<sup>51</sup> Committee on the Accountability of International Organisations (n 42) 22-23

<sup>52</sup> Accountability of International Organisation (n 42), 22-23

<sup>53</sup> Human rights due diligence policy on United Nations support to non-United Nations security forces UN Doc., A/67/775-S/2013/110 (2013), Helmut Philipp Aust, 'The UN Human Rights Due Diligence Policy: An Effective Mechanism against Complicity of Peacekeeping Forces?' (2014) *Journal of Conflict and Security Law Advance Access*, doi:10.1093/jcsl/kru011

<sup>54</sup> Ibid.

<sup>55</sup> Ibid.

<sup>56</sup> Due diligence guidelines for the responsible supply chain of minerals from red flag locations to mitigate the risk of providing direct or indirect support for conflict in the eastern part of the Democratic Republic of the Congo, available at [http://www.un.org/News/dh/infocus/drc/Consolidated\\_guidelines.pdf](http://www.un.org/News/dh/infocus/drc/Consolidated_guidelines.pdf), Security Council Resolution 1596 (2005) This has been extended to Peacekeepers in the Congo in an Environmental Context, Greening the Blue Helmets Environment, Natural Resources and UN Peacekeeping Operations UNEP, available at [http://www.un.org/en/events/environmentconflictday/pdf/UNEP\\_greening\\_blue\\_helmets\\_ES.pdf](http://www.un.org/en/events/environmentconflictday/pdf/UNEP_greening_blue_helmets_ES.pdf)

international human rights and humanitarian law compliance and this continues in the most recent report of the Special Rapporteur.<sup>57</sup> This has also been taken up by CEDAW's Committee in General Recommendations No. 19, 28 and 30 though again with states and their relationship with private actors as their primary aim.<sup>58</sup> Recommendation No. 30 extends extraterritorial application beyond states when effective control is exercised re-emphasising the duality of state/IGO interactions but also exhorts a due diligence approach to other international human rights and humanitarian law obligations beyond CEDAW.<sup>59</sup>

The Convention applies to a wide range of situations, including wherever a State exercises jurisdiction, such as occupation and other forms of administration of foreign territory, for example United Nations administration of territory; to national contingents that form part of an international peacekeeping or peace-enforcement operation; to persons detained by agents of a State, such as the military or mercenaries, outside its territory; to lawful or unlawful military actions in another State; to bilateral or multilateral donor assistance for conflict prevention and humanitarian aid, mitigation or post-conflict reconstruction; in involvement as third parties in peace or negotiation processes; and in the formation of trade agreements with conflict-affected countries<sup>60</sup>

These institutional approaches remain *ad hoc*, however with due diligence obligations originating from state obligations rather than the recognition of institutional governance authority which has little or no connection to the populations over which constituted power is exercised that ought to necessitate its implementation.<sup>61</sup>

### **International Humanitarian Law and due diligence<sup>62</sup>**

The engagement of a state's force against belligerent forces (both state and non-state) as well as interactions with civilian bodies within the purview of IHL requires a high level of control of the activities of actors under (or that ought to be) the authority of the governance power. Unlike some other areas IHL treaties set out specific requirements that can be characterised as due diligence. In the *Akayesu* case the Court found that Common Article 3 of Geneva Conventions (which also forms

<sup>57</sup> Integration of The Human Rights of Women and The Gender Perspective: Violence Against Women The Due Diligence Standard As A Tool For The Elimination Of Violence Against Women UN Doc E/CN.4/2006/61 follows from The Declaration on the Elimination of Violence against Women adopted by the General Assembly which under article 4(c), to 'exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons', Manjoo (n 28)

<sup>58</sup> Committee on the Elimination of Discrimination against Women, General Recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations, UN Doc CEDAW/C/GC/30, 2013, see also Committee on the Elimination of Discrimination Against Women General Recommendations Nos. 19 UN Doc A/47/38 and Committee on the Elimination of Discrimination against Women, General recommendation No. 28 on the core obligations of States parties under article 2 of CEDAW, UN Doc CEDAW/C/GC/28, 2010

<sup>59</sup> Ibid., General Recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations, UN Doc CEDAW/C/GC/30, 2013, para 8, 10 & 11

<sup>60</sup> Ibid., para 9

<sup>61</sup> Ensuring the accountability of United Nations staff and experts on mission with respect to criminal acts committed in peacekeeping operations UN Doc. General Assembly, A/60/980, 2006, the UN Independent Audit Advisory Committee, UN Doc General Assembly, A/RES/60/248, 2006, Strengthening Accountability, at <http://www.un.org/en/strengtheningtheun/accountability.shtml>

<sup>62</sup> This section is taken from the author's submission to the ILA Draft First Report on Due Diligence regarding international humanitarian law.

part of customary international law) and Additional Protocol I & II set the minimum and unconditional standard of duty for states and non-state actors engaged in the use of force.<sup>63</sup> For example, the 1907 Hague Convention imposes liability on states failing to exercise due diligence to prevent war crimes.<sup>64</sup> Under Article 1 of the four Geneva Conventions parties undertake to ensure respect for the Convention in all circumstances imposing a minimum duty of due diligence whilst Additional Protocol I states that parties to a conflict shall be responsible for all acts committed by persons forming part of its armed forces.<sup>65</sup>

Early development of due diligence within IHL focused on the minimum standards to establish the responsibility of states. Thus the interaction between the law of state responsibility and IHL became paramount.<sup>66</sup> *Alabama Arbitration* defined due diligence as in proportion to the magnitude of the object, dignity and strength of the power exercising it.<sup>67</sup> It also affirmed that states have an obligation to take all effective measures to ensure that no harm comes to other states either in or from their territory.<sup>68</sup> While this is specifically with regard to legal neutrality critically it includes omissions. In the *Armed Activities on the Territory of Congo* the ICJ held that Uganda bore the obligations of an occupying power, including taking 'appropriate measures to prevent the looting, plundering and exploitation of natural resources in the occupied territory to cover private persons in this district and not only members of Ugandan military forces.'<sup>69</sup> While the line between occupation and territorial administration remains disputed the acceptance by the UN of the application of IHL would suggest this interpretation should extend to its operations.<sup>70</sup>

Regarding non-actors fulfilling state roles during conflict, in *Yeager v Iran* the Tribunal found that the actions of private actors carrying out state functions, in the absence of regular state authorities, could be attributable to the State and arguably, by extension to an IGO.<sup>71</sup> The emergence of private military contractors has added to the complexities of understanding due diligence in such circumstances. Private entities/non-state actors or individuals may violate IHL due diligence even if their conduct is not attributed to the state which also arguably extends to IGOs even if this is the shared duality of state/IGO interaction. In such instances, an IGO may incur responsibility if it is not diligent in pursuing and preventing acts contrary to international law by prosecuting and punishing private perpetrators. Yet, this does not mean that the IGO is inevitably required to exercise due

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<sup>63</sup> *Prosecutor v Jean Paul Akayesu* Judgment of 1 June, 2001. [432-445], 1949 Geneva Conventions, 75 UNTS 287, 1977 Additional Protocol I & II, 1125 UNTS 3 Due diligence within IHL can lead to unusual arguments in favour of the use of force. For example, the British claimed in 1807 that due diligence required the shelling of neutral Copenhagen to prevent the fleet following to Napoleon. A. N. Ryan, 'The Causes of the British Attack upon Copenhagen in 1807' (1953) 68 *The English Historical Review* 37, Quincy Wright, 'Responsibility for Losses in Shanghai' (1932) 26 *AJIL* 586

<sup>64</sup> Hague Regulations, Regulations concerning the Laws and Customs of War on Land, annexed to Convention (IV) respecting the Laws and Customs of War on Land, The Hague, 1907, Article 3

<sup>65</sup> 1949 Geneva Conventions (I-IV) 75 UNTS 287, Article 1, 1977 Additional Protocol II, 1125 UNTS 3, Article 91

<sup>66</sup> Amos Hershey, *The Essentials of International Public Law and Organization* (MacMillan, 1927) 550

<sup>67</sup> *Alabama Claims Arbitration (United States/Great Britain)* (1872) 1 Moore Intl Arbitrations 495

<sup>68</sup> *Ibid* see also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, (1986) *I.C.J. Reports* 14, 126

<sup>69</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* Judgment, [2005] ICJ. Reports 168, 253

<sup>70</sup> Ratner (n.6), 695-697

<sup>71</sup> *Yeager v. The Islamic Republic of Iran, Iran-U.S.* (1987) 17 CTR 92, 101-104

diligence no matter the connection to the armed group, the degree of attribution will also set the requirements in motion and this is likely to be more extenuated than in the examples of states.

In the *Nicaragua* case the ICJ applied the 'effective control' test.<sup>72</sup> The ICTY in the *Tadić* case stated that in applying IHL rather than the law of state responsibility, the 'overall control test', ought to apply.<sup>73</sup> Following this reasoning, once overall control was established the state would have to act with due diligence and thus take positive steps to assess harm and risk, to notify and consult, to prevent and protect, to investigate and to grant reparations or restitution when harm has occurred. In the *Prevention and Punishment of the Crime of Genocide* the ICJ rejected the ICTY's position and returned to 'effective control'.<sup>74</sup> This disagreement is significant as it determines in what circumstances a state, and in practice an IGO, ought to exercise due diligence regarding non-state actors.

IHL's relationship to international criminal law is also significant. The Permanent Court of Arbitration in the *British Claims in the Spanish Zone of Morocco* found due diligence requirements to prevent and punish the unlawful acts of armed groups.<sup>75</sup> While in the *Essen Lynching Trial* the Court found that the failure to protect allied prisoners of war from aggressive mobs fell below the required standard.<sup>76</sup> In the *Akayesu* case the Court found that Article 4 of the ICTR Statute in combination with violations of Common Article 3 of the Geneva Conventions and Additional Protocol I & II did not set persons to be prosecuted therefore the relationship to the state was not necessarily a prohibition to prosecution but rather the duty of the state to provide minimum protection to those covered was the basis on which due diligence operated.<sup>77</sup> Whilst these cases addressed states, it is arguable they apply equally to IGOs, if in a somewhat modified form.

Common Article 3 and other elements of IHL are certainly part of customary international law and so too the due diligence requirements that accompany them. As the ICRC argues '[g]iven that multinational forces are more often than not deployed in conflict zones it becomes essential to determine when a situation is an armed conflict in which IHL will constitute an additional legal framework governing a specific operation' and so too, due diligence.<sup>78</sup>

### **Due Diligence and international human rights<sup>79</sup>**

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<sup>72</sup> *Nicaragua* (n 68)

<sup>73</sup> *Prosecutor v Tadić* ICTY, Appeals Chamber, 1999 (Case no. IT-94-1-A).

<sup>74</sup> *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* Judgment [2007] ICJ Reports 43

<sup>75</sup> *British claims in the Spanish zone of Morocco* (1925) 2 RIAA 615, s 3-6

<sup>76</sup> United Kingdom, Military Court at Essen, *The Essen Lynching case* (1946) 1 WCR 88, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* Separate Opinion of Judge Ranjeva [2007] ICJ Reports 43, 277, 1998 Rome Statute of the International Criminal Court, 2187 UNTS 90/37, Article 5

<sup>77</sup> *Akayesu* (n 64), 432-445, 1949 Geneva Conventions, 75 UNTS 287, 1977 Additional Protocol II, 1125 UNTS

<sup>78</sup> ICRC Report on Contemporary Challenges to International Humanitarian Law, 31IC/11/15.1.2, 31 available at <http://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf>

<sup>79</sup> Ralph Wilde, 'Quis Custodiet Ipsos Custodes: Why and How UNHCR Governance of Development Refugee Camps Should be Subject to International Human Rights Law' (1998) 1 *Yale Hum. Rts. & Dev. LJ* 107. Salomon (n 25) 183

Since its inception international human rights has focused on states, though as we have already seen with regard to IHL and below with regard to economic law, human rights do play a role in how IGOs also regard their obligations.<sup>80</sup> Unlike economic law, due diligence as a term of art is less engaged, with the exception of CEDAW and the Special Rapporteur on Violence against Women, but nonetheless a similar remit of both positive and negative obligations are present. As within IHL, international human rights due diligence does not require the actor engaged in the breach to be the state or one of its actors.<sup>81</sup> At a very basic level, human rights which are also *jus cogens* norms necessarily have the strictest obligations and are binding upon IGOs but other rights which form part of customary international law are also relevant.<sup>82</sup>

The UN has issued a limited number of specific human rights policies on due diligence. For example the Human Rights Council Protect, Respect and Remedy Framework in 2008 incorporates civil, political, economic, social and cultural rights, and includes the right to development which is particularly significant in the economic law framework.<sup>83</sup> Yet, the policy entirely targets states and corporations undertaking human rights due diligence and thus is outward looking rather than examining the UN's own due diligence in these matters. With regard to the specifics of women's rights, here again, the UN has been more outward looking than internally examining its own practices which given the limited role of women in leadership positions at the UN is problematic. As previously mentioned the Special Rapporteurs on Violence Against Women uses due diligence to assure observance and, when this does not occur, to criticise the ever-present reactive approaches.<sup>84</sup> Yet, these examples are characterised by an IGO exhortation of states to take up due diligence in their human rights application both also require that states ensure that this occurs when non-state actors take actions which could include organisations of which they are members thus using the duality to extend due diligence obligations.

As the ILA Report of Due Diligence remarks, it is with regard to economic and social rights that due diligence has had its most traction, but civil and political rights and third generation rights are as relevant in scenarios of state-building and territorial administration. Due diligence requirements are interpreted by the bodies created by the treaties, whose remit is thus limited to review of state's activities, as for example the CEDAW example mentioned earlier. Other than clear customary legal obligations it has been up to the IGOs to adopt a human rights framework and thus due diligence into their activities. Thus far this has not been done with any great enthusiasm with the possible limited exception of the UN in Kosovo which contained the UN Third Party Claims Process, the Kosovo Ombudsman, the Kosovo Human Rights Advisory Panel that investigates potential violations

<sup>80</sup> August Reinisch, 'The Changing International Legal Framework for Dealing with Non-State Actors' in Philip Alston (ed), *Non-State Actors and Human Rights* (OUP, 2005)

<sup>81</sup> *Velasquez Rodriguez v Honduras*, Inter-Am Ct HR (Ser C) No 4 (1988), Judgment of 29 July 1988, para 172

<sup>82</sup> Boris Kondoch 'Human Rights Law and UN peace operations in post-conflict situations' in White and Klaasen (n 41) 27-33

<sup>83</sup> United Nations Protect, Respect and Remedy Framework UN Doc, A/HRC/8/5 7 April 2008, this mirrors a similar step in the OECD Due Diligence Guidance for Responsible supply Chains of Minerals from Conflict-Affected and High-Risk Areas <http://www.oecd.org/daf/inv/mne/GuidanceEdition2.pdf>

<sup>84</sup> Integration of The Human Rights of Women and The Gender Perspective: Violence Against Women The Due Diligence Standard as a Tool For The Elimination Of Violence Against Women UN Doc E/CN.4/2006/61 which follows from The Declaration on the Elimination of Violence against Women adopted by the General Assembly in 1993 which under article 4(c), to 'exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons', Manjoo (n 29)

of human rights by UNMIK and the ICCPR Human Rights Committee Reports on Kosovo though this latter example has been filtered through Serbia's state obligations.<sup>85</sup> The Kosovo Human Rights Advisory Panel has suffered by being a creation of the body it investigates and thus is subject to UNMIK's decision to restrict its parameters.<sup>86</sup> In addition, the plethora of bodies investigating the actions of an IGO in a relatively small geographical area in an almost totally reactive fashion illustrates the limited character of human rights due diligence during territorial administration.

In respect of civil and political rights, the duty to prevent acts of cruel, inhuman or degrading treatment, the duty to investigate disappearances at the hands of non-state actors and to respect and 'ensure' individuals enjoy their civil and political rights in general and have access to effective remedies imply the necessity of a standard of due diligence in the guise of investigation, prosecution, reparations or restitution, depending on the situation. In the post-conflict setting it would also require IGOs to fully consider the context of their administration rather than merely taking a 'one-size fits all approach' that entirely relies on reactive due diligence to remedy violations. In regard to economic and social rights terms such as 'all appropriate measures' to 'achieve progressively' the rights enables a use of due diligence to ensure certain steps are taken, progress is reviewed and substantive progress made.<sup>87</sup>

Whilst this has largely been state focused, as with IHL the interrelationship and duality between a state's implementation and that of an IGO when both are in a governance position within a particular site opens both to claims when due diligence obligations have not been fulfilled and there is a dual responsibility for rights violations. In sum, with regard to international human rights, while there is some due diligence practice it is largely reactive and does not appear to be part of the overarching approach to implementing human rights into IGO operations.

### **Due Diligence and International Economic Law**

Due diligence found a natural home within private commercial transactions, but regarding the activities of international economic actors such as the World Bank Group or the IMF, who are often engaged in different stages of the pre and post conflict scenarios, the requirements of due diligence are less obvious. The notion of the 'right to development' is critical here, specifically regarding the methods by which these organisations go about achieving this during post-conflict situations.<sup>88</sup> The

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<sup>85</sup> UN Third Party Claims Process General Assembly Resolution 52/247 (1998), Rambouillet Accords: Interim Agreement for Peace and Self-Government in Kosovo, 7 June 1999, S/1999/648, though the Vienna Commission has critiqued UNMIK for its lack of accountability, European Commission For Democracy Through Law, Opinion on Human Rights in Kosovo: Possible Establishment of Review Mechanisms, Opinion No. 280/2004 (CDL-AD (2004)033), 11 October 2004, which led to the creation of the Advisory Panel by UNMIK Regulation No. 2006/12 of 23 March 2006 on the Establishment of the Human Rights Advisory Panel.

<sup>86</sup> UNMIK, Administrative Direction No. 2009/1 of 17 October 2009, UNMIK/DIR/2009/1.

<sup>87</sup> See, e.g., International Covenant on Economic, Social and Cultural Rights 1966, 993 UNTS 3 (ICESCR) article 2(1); Convention on the Elimination of All Forms of Discrimination Against Women 1979, 1249 UNTS. 13 (CEDAW) article, especially (e), (f), (g) and article 5(a) and (b); Convention on the Rights of the Child 1989, 1577 UNTS 3 (CRC) articles 2(1) and (2); International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families 1990, 2220 UNTS 3 (MWC) article 7; Convention on the Rights of Persons with Disabilities 2006, 2515 UNTS 3 (CRPD) article 4, especially (1)(b), (e-i) and (2).

<sup>88</sup> Declaration on the Right to Development (1986) UN Doc A/RES/41/128. UNDP, *Human Development Report 2005: International Cooperation at a Crossroads: Aid, Trade and Security in an Unequal World* (OUP, 2005) 126, Bi-lateral aid, while not within the remit of this article, also is often tied to economic obligations such as privatisation or the opening up to investment.



question becomes what due diligence standards ought these organisations hold themselves to when engaging in post-conflict states particularly those under territorial administration.<sup>89</sup>

Both the IMF and World Bank Group deploy due diligence in their agreements with states and the conditionality they impose. The peculiar character of these "letters of intent" or memorandums of understanding that both the IMF and World Bank Group set with states means that despite appearing to be treaties they are not, thus review of the obligations created therein is difficult.<sup>90</sup> The financial implications of states not following their content may impact on their ability/willingness to comply with other obligations particularly economic and social rights.<sup>91</sup> Both the formulations of agreements with the World Bank Group and IMF as well as the form of economic system established during the territorial administration is critical, as with other IGOs, due diligence tends to have an outward rather than inward and reflective focus. Thus, while these institutions require states to take due diligence into their practice in an outward fashion this is not replicated within the organisations. Solomon links human rights and particularly the right to development and attributes these obligations to the World Bank, the IMF and the WTO while also critiquing their lack of fulfilment.<sup>92</sup>

Within the IMF the most obvious use of due diligence is the instigation of a safeguards assessment. The aim of these is to protect the IMF's investment and guarantee the repayment of loans by ensuring a client state's central bank's governance is at the necessary standard. These safeguards require external audit mechanisms, legal structures and autonomy, financial reporting, internal audit mechanisms and a system of internal controls.<sup>93</sup> These due diligence procedures extend into processes to ensure that policies on Longer Term Programme Engagement include in ensuring a state maintains its economic reforms and if anything in post-conflict scenarios are stricter than for other states.<sup>94</sup> Under its Articles of Agreement the IMF must establish adequate safeguards to ensure that loans are repaid and this is a duty the IMF owes to its own members, but this has largely been interpreted as outward facing.<sup>95</sup> All contemporary agreements with states contain due diligence provisions that also form part of the reviews of states' implementation. The creation of the Independent Evaluation Office in 2001 to appraise the IMF goes someway to introducing a due

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<sup>89</sup> Celine Tan *Governance through Development: Poverty Reduction Strategies, International Law and the Disciplining of Third World States Law, Development and Globalization* (Routledge, 2011) 102-110

<sup>90</sup> Joseph Gold *Legal and Institutional Aspects of the International Monetary System: Selected Essays, Volume 1* (IMF, 1979) 12

<sup>91</sup> Deborah Siegel, 'Legal Aspects of the IMF/WTO Relationship: The Fund's Articles of Agreement and the WTO Agreements' (2002) *AJIL* 561, 579. Though the IMF has qualms using credit rating agencies in place of due diligence, Panayotis Gavras 'Ratings Game' *Finance & Development* March 2012, available at <http://www.imf.org/external/pubs/ft/fandd/2012/03/gavras.htm#author>

<sup>92</sup> Salomon (n 25) Chap 5, Philip Alston, 'The International Monetary Fund and the Right to Food' (1987) 30 *HLJ* 473, M. Lucas, 'The International Monetary Fund's Conditionality and the International Covenant on Economic Social and Cultural Rights' (1992) 25 *RBDI* 104, and M. Cogen, 'Human Rights, Prohibition of Political Activities and the Lending Policies of the World Bank and the International Monetary Fund' in S R Chowdhury et al (eds), *The Right to Development in International Law* (Martinus Nijhoff, 1992) 379

<sup>93</sup> Details available from the IMF at <http://www.imf.org/external/np/exr/facts/pdf/safe.pdf>

<sup>94</sup> Review of Ex Post Assessments and Issues Relating to the Policy on Longer-Term Program Engagement, March 2006 available at <https://www.imf.org/external/np/pp/eng/2006/032006R.pdf>

<sup>95</sup> Articles of Agreement of the International Monetary Fund, Article 1 (v), 5. 3(a)

diligence review of the organisation that while welcome, and perhaps is more significant than any UN attempts to evaluate its own work, still leaves the organisation with a relatively open hand.<sup>96</sup>

The World Bank's constituent organisations take a pro-active approach to due diligence, but as with the IMF this is largely state focused. For instance, as part of its due diligence process the International Financial Corporation (IFC) in facilitating investment examines the 'environmental and social risks and opportunities' in a company's process of investing including corruption and fraud but also human rights impact assessments.<sup>97</sup> The World Bank Group also requires environmental impact assessments and have a due diligence checklist for aspects such as public-private partnerships.<sup>98</sup> As with the IMF, the World Bank constituent organisations are also bound by its Articles of Agreement to adequately safeguard its resources and have taken this as paramount in the conditionality they extend.

Yet, how the requirements of the Articles of Agreements are to be achieved or adjudged could be broader than a strict monetary assessment.<sup>99</sup> Whilst, for example, the World Bank Group adopts some human rights based principles into its activities, as with the UN, this has largely been an outward focus rather than a process where it incorporates due diligence standards into its own institutional operation. What is critical about these forms of due diligence assessment is that while uniquely they are requirements of their own founding agreements, aiming to safeguard their resources, there is some leeway as to how this protection is to be achieved. Taking a holistic approach to their Articles of Agreement, particularly their creation in the post-conflict scenario of World War II, the clear link between development, economic stability and peace could be taken to require a balancing of the necessity to safeguard resources and while also attaining economic development that contributes to peace. This would require both an active and reactive approach to these obligations that a due diligence methodology would appear to support.

The impact of economic policies driven by multilateral bodies has been documented elsewhere as have the impact of sanctions regimes overseen by the UN and regional bodies upon local populations.<sup>100</sup> In the aftermath of conflict the imposition of particular economic policies have been

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<sup>96</sup> Independent Evaluation Office terms of reference,

<http://www.ieoimf.org/ieo/pages/TermsOfReference.aspx> These have included reviews of loans to Sub-Saharan Africa, Fiscal Adjustment Programmes and Conditionality Completed Reports available at <http://www.ieo-imf.org/ieo/pages/Completed.aspx>

<sup>97</sup> [http://www.gcgf.org/wps/wcm/connect/corp\\_ext\\_content/ifc\\_external\\_corporate\\_site/what+we+do/due+diligence](http://www.gcgf.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/what+we+do/due+diligence),

[http://www.ifc.org/wps/wcm/connect/Topics\\_Ext\\_Content/IFC\\_External\\_Corporate\\_Site/Guide+to+Human+Rights+Impact+Assessment+and+Management/About+the+Guide+to+HRIAM/](http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/Guide+to+Human+Rights+Impact+Assessment+and+Management/About+the+Guide+to+HRIAM/)

<sup>98</sup> <http://ppp.worldbank.org/public-private-partnership/ppp-overview/practical-tools/checklists-and-risk-matrices/due-diligence-checklis>

<sup>99</sup> The duties of States to govern corporate conduct is the subject of the UN Guiding Principles on Business and Human Rights 2011. It also forms part of the United Nations Convention against Corruption (UNCAC), 2000 UN Convention against Transnational Organized Crime 1999, International Convention for the Suppression of the Financing of Terrorism, 2005 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism which require due diligence in preventative and enforcement practices which impact on conflict states though without the extension of its provisions to international organisations. The IMF has integrated much of the requirements of these treaties into its own processes for approval of loans, see Revisions to the Financial Action Task Force (FATF) Standard—Information Note to the Executive Board July 17, 2012

<sup>100</sup> Newman (n 31), 111-137

evident in state-led operations such as in Iraq or Bosnia where loans are secured by the IMF or World Bank during occupation and while governance is exercised by IGOs.<sup>101</sup> When a governance mandate includes economic development it is questionable whether this requires the instigation of a particular form of economic order generally based upon a liberal economics.<sup>102</sup> This is particularly problematic when economic concerns were part of the actual spiral into violent conflict as in Yugoslavia, Haiti or Rwanda. As Solomon attests '[w]orld poverty is also attributable to the existing global system, elements of which by design, cause and/or fail to remedy this widespread deprivation' and this forms part of the conflict narrative.<sup>103</sup>

## Conclusion

Multilateralism has brought distinct changes to the operation of international law and due diligence is an excellent example of this evolution. Yet the development of multilateralism makes it critical to reflect upon what due diligence adds to governance, particularly when there is no constituent link between the population in a territory and the governance authority in place. Where there is dual authority how power is exercised ought to be subject to law's scrutiny. The chaos of illegitimacy that often leads to conflict cannot be resolved in the post-conflict scenario, if those in governance insist on the due diligence of those emerging from conflict but not upon themselves. IGOs have both the experience as well as the human and monetary resources, often lacking in post-conflict states, that enables some foresight which would identify issues likely to arise as a result of their intervention and the post-conflict scenario. A due diligence approach would enable them to take an active approach that would perhaps forestall some of the reactive actions that have been taken in places such as Kosovo or Bosnia.

Thus far IGOs have largely taken an outward facing approach to due diligence. The UN, World Bank Group and the IMF all acknowledge the international humanitarian, human rights and economic law obligations establish due diligence requirements. Yet, in the majority of instances IGOs regard these requirements as necessary for state compliance rather than their own governance activities. This is a particular imperative when states are emerging from conflict, when their own capacity to ensure compliance with their international legal obligations is probably minimal. A failure by IGOs to engage with due diligence would justifiably enable post-conflict states to question the legitimacy of IGO governance.

The establishment of Ombudspersons, Panels and Evaluation Offices by the UN, IMF or World Bank Group are positive steps, but again, these are reactive and thus a further reliance on the responsibility arm of due diligence rather than the proactive and long-term processes that are necessary. Positive obligations are due during transition and peace-building. The lack of participation by the local population in choosing their governance combined with the duality of governance between states and IGOs makes due diligence all the more critical as without it violations will simply fall between the cracks of unclaimed authority. In the post-conflict situation and beyond, as a method of self-regulation, of continued re-evaluation of compliance with international legal

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<sup>101</sup> Amy Bartholomew (ed) *Empire's law: the American imperial project and the war to remake the world* (Pluto, 2006), Michael Bhatia, 'Post-conflict Profit: The Political Economy of Intervention' (2005) 11 *Global Governance* 205

<sup>102</sup> Chesterman (n 5)

<sup>103</sup> Solomon (n 24) 186

obligations and as a tool of accountability IGOs must engage with due diligence beyond requiring it of states.